

APPEAL NO. 170345

FILED APRIL 6, 2017

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 4, 2017, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the respondent (claimant) is not entitled to supplemental income benefits (SIBs) for the first quarter, sixth quarter, and seventh quarter; (2) the claimant is entitled to SIBs for the second quarter, third quarter, and fifth quarter; (3) the appellant (self-insured) waived its right to contest entitlement to SIBs for the second quarter and third quarter by failing to timely request a benefit review conference (BRC); and (4) the self-insured did not waive its right to contest entitlement to SIBs for the first quarter, fifth quarter, and sixth quarter for failing to timely request a BRC.

The self-insured appealed the hearing officer's determinations that it waived the right to contest entitlement to second and third quarter SIBs, and that the claimant is entitled to second, third, and fifth quarter SIBs. The self-insured contends that the evidence does not support the appealed determinations. The self-insured also contends that the issue of whether it waived the right to contest entitlement to SIBs for the sixth quarter was not an issue for the hearing officer to determine at the CCH. The claimant responded, urging affirmance of the hearing officer's determinations appealed by the self-insured.

The hearing officer's determinations that the claimant is not entitled to first, sixth, and seventh quarter SIBs and that the self-insured did not waive its right to contest entitlement to first and fifth quarter SIBs were not appealed and have become final pursuant to Section 410.169.

DECISION

Affirmed as reformed in part and reversed and rendered in part.

The parties stipulated in part that: the claimant sustained a compensable injury on (date of injury), which resulted in an impairment rating of 15% or greater; the claimant has not commuted any portion of the impairment income benefits; the qualifying periods for the second, third, and fifth quarters of SIBs were from April 22 through July 21, 2015, July 22 through October 20, 2015, and January 20 through April 19, 2016; the claimant's county of residence, Montgomery County, requires three work

searches per week; and the claimant is not entitled to first and seventh quarter SIBs. The evidence established that the claimant was injured by a student.

REFORMED PORTIONS OF DECISION

In Finding of Fact No. 3 the hearing officer found that during the qualifying periods for the second, third, and fifth quarters of SIBs the claimant was unable to perform any type of work in any capacity and her unemployment was a direct result of her impairment from the compensable injury. However, in her discussion the hearing officer specifically stated that the claimant “did not submit sufficient medical documentation to support her claim for total inability to work for the second quarter of SIBs but as [the] [self-insured] has waived its right to contest entitlement to SIBs for the second quarter [the] [c]laimant is entitled to second quarter of (sic) SIBs.” The hearing officer made the same statement regarding the third quarter of SIBs. The evidence established that the claimant did not submit sufficient medical documentation to support her claim for total inability to work for either the second or third quarter of SIBs. Accordingly, we reform Finding of Fact No. 3 to state that during the qualifying periods for the second and third quarters of SIBs the claimant had some ability to work to conform to the evidence and the hearing officer’s discussion.

Additionally, the self-insured contended on appeal that whether it waived the right to contest entitlement of sixth quarter SIBs was not an issue for the hearing officer to determine at the CCH. Waiver of sixth quarter SIBs was not listed on the BRC report, was not added at the CCH, and was not actually litigated at the CCH. The hearing officer exceeded the scope of the issue before her. Accordingly, we reform the hearing officer’s decision by striking the sixth quarter of SIBs from Conclusion of Law No. 6, the Decision, and the Decision and Order paragraph on the first page of the decision.

WAIVER OF RIGHT TO CONTEST ENTITLEMENT TO THIRD QUARTER SIBs

The hearing officer’s determination that the self-insured waived its right to contest entitlement to SIBs for the third quarter is supported by sufficient evidence and is affirmed.

ENTITLEMENT TO THIRD QUARTER SIBs

The hearing officer’s determination that the claimant is entitled to SIBs for the third quarter is supported by sufficient evidence and is affirmed.

WAIVER OF RIGHT TO CONTEST ENTITLEMENT TO SECOND QUARTER SIBs

The hearing officer determined that the self-insured waived its right to contest entitlement to second quarter SIBs. The hearing officer noted in her discussion that the

parties stipulated the claimant is not entitled to first quarter SIBs, that the claimant filed her Application for [SIBs] (DWC-52) for the second quarter of SIBs on July 24, 2015, and that the self-insured¹ had 10 days in which to dispute the DWC-52 by filing a Request to Schedule, Reschedule, or Cancel a [BRC] (DWC-45), or until August 3, 2015. The self-insured noted in its appeal that the evidence established that the claimant signed the second quarter DWC-52 on July 24, 2015, but the claimant did not file that DWC-52 with the self-insured until July 28, 2015.

28 TEX. ADMIN. CODE § 130.108(c) (Rule 130.108(c)) provides as follows:

Insurance Carrier Dispute; Subsequent Quarter With Prior Payment. If an insurance carrier disputes entitlement to a subsequent quarter and the insurance carrier has paid [SIBs] during the quarter immediately preceding the quarter for which the [DWC-52] is filed, the insurance carrier shall dispute entitlement to the subsequent quarter by requesting a [BRC] as provided by [Rule] 141 of this title (relating to Dispute Resolution-[BRC]) within 10 days after receiving the [DWC-52]. An insurance carrier waives the right to contest the entitlement to [SIBs] for the subsequent quarter if the request is not received by the Texas Department of Insurance, Division of Workers' Compensation within 10 days after the date the insurance carrier received the [DWC-52]. The insurance carrier does not waive the right to contest entitlement to [SIBs] if the insurance carrier has returned the injured employee's [DWC-52] pursuant to [Rule] 130.104(c) of this title (relating to Determination of Entitlement or Non-entitlement for Subsequent Quarters).

Rule 130.108(d) provides as follows:

Insurance Carrier Disputes; Subsequent Quarter Without Prior Payment. If an insurance carrier disputes entitlement to a subsequent quarter and the insurance carrier did not pay [SIBs] during the quarter immediately preceding the quarter for which the [DWC-52] is filed, the insurance carrier shall send the determination to the injured employee within 10 days of the date the form was filed with the insurance carrier and include the reasons for the insurance carrier's finding of non-entitlement and instructions about the procedures for contesting the insurance carrier's determination as provided by subsection (a) of this section.

¹ We note that the hearing officer refers to the self-insured as a carrier throughout the decision.

In evidence is the claimant's DWC-52 for the second quarter signed by the claimant on July 24, 2015. In Finding of Fact No. 5 the hearing officer found that the self-insured received the claimant's DWC-52 for the second quarter on July 24, 2015. However, that same document shows that the self-insured actually received the DWC-52 for the second quarter on July 28, 2015. In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. See *Cain v. Bain*, 709 S.W.2d 175 (Tex. 1986). See Appeals Panel Decision (APD) 100267, decided April 19, 2010. The hearing officer's finding that the self-insured received the DWC-52 for the second quarter on July 24, 2015, is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse the hearing officer's finding that the self-insured received the claimant's DWC-52 for the second quarter on July 24, 2015.

In evidence is a DWC-45 from the self-insured filed on August 4, 2015, disputing the claimant's entitlement to second quarter SIBs. Also in evidence is the self-insured's determination of non-entitlement to second quarter SIBs dated August 4, 2015. As discussed above, the evidence established that the self-insured received the DWC-52 for the second quarter on July 28, 2015. The 10th day after July 28, 2015, is Friday, August 7, 2015. The self-insured in the case met the requirements to timely dispute the claimant's entitlement to second quarter SIBs. Accordingly, we reverse the hearing officer's determination that the self-insured waived the right to contest entitlement to second quarter SIBs, and we render a new decision that the self-insured did not waive the right to contest entitlement to second quarter SIBs.

Additionally, we note that the evidence does not establish that quarter one was actively under dispute on the date the self-insured received the claimant's DWC-52 for the second quarter. Therefore, the self-insured was not required to file a DWC-45 within 10 days of receiving the claimant's DWC-52 for the second quarter. See APD 051130-s, decided July 12, 2005; APD 032868-s, decided December 11, 2003; APD 080242, decided April 7, 2008; APD 041362, decided July 27, 2004; APD 041726, decided September 2, 2004; and APD 070653, decided May 29, 2007.

CLAIMANT'S ENTITLEMENT TO SECOND QUARTER SIBs

The hearing officer made clear in her decision that she based her determination that the claimant is entitled to second quarter SIBs solely on her determination that the self-insured waived the right to contest second quarter SIBs. However, given that we have reversed the hearing officer's determination that the self-insured waived the right

to contest entitlement to second quarter SIBs and have rendered a new decision that the self-insured did not waive the right to contest entitlement to second quarter SIBs, we also reverse the hearing officer's determination that the claimant is entitled to second quarter SIBs, and we render a new decision that the claimant is not entitled to second quarter SIBs.

CLAIMANT'S ENTITLEMENT TO FIFTH QUARTER SIBs

The hearing officer found that during the qualifying period for fifth quarter SIBs the claimant was unable to perform any type of work in any capacity, and therefore determined that the claimant is entitled to fifth quarter SIBs. The hearing officer discussed a Work Status Report (DWC-73) from a (Dr. O) taking the claimant off work from March 16 through April 14, 2016, and medical notes from Dr. O.

Rule 130.102(d)(1) provides, in pertinent part, that an injured employee demonstrates an active effort to obtain employment by meeting at least one or any combination of the following work search requirements each week during the entire qualifying period:

* * * *

(E) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

In APD 012286, decided November 14, 2001, the Appeals Panel "held that the narrative report from the doctor must specifically explain how the compensable injury causes a total inability to work." See *also* APD 032173, decided October 9, 2003, and APD 111188, decided October 10, 2011.

We note that Dr. O's records in evidence refer to a work-related injury that occurred on March 28, 2014. There was evidence in the record to show that the claimant sustained a separate work-related injury on March 28, 2014. The date of injury in this case is (date of injury). Even if Dr. O mistakenly referenced an incorrect date of injury, none of her records specifically explain how the compensable injury causes a total inability to work. In a record dated March 17, 2016, Dr. O stated that the claimant was recovering from surgery to the right shoulder and finished chronic pain management program. However, she noted that (Dr. B) thought the claimant could "maybe . . . be back to school soon" and noted that the claimant thought "that maybe she could go back to work if could (sic) go to different classroom." In a record dated April 14, 2016, Dr. O noted that the claimant thought that "maybe she could go back to

work now with progress of shoulder but would not be able to restrain children so wouldn't be appropriate for her to be in her previous classroom." In that same record Dr. O recommended that the claimant return to a classroom that would not require her to physically restrain children or have high likelihood of repeat assault by a child. In another record dated May 10, 2016, Dr. O stated that she thinks the claimant is "doing well in getting back to work." Dr. O did not provide an explanation specifically explaining how the compensable injury causes a total inability to work.

We reverse the hearing officer's determination that the claimant is entitled to fifth quarter SIBs as being so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Because there is no narrative from a doctor that specifically explains how the compensable injury caused a total inability to work in any capacity we reverse the hearing officer's determination that the claimant is entitled to fifth quarter SIBs, and we render a new decision that the claimant is not entitled to fifth quarter SIBs.

SUMMARY

We affirm the hearing officer's determination that the self-insured waived its right to contest entitlement to third quarter SIBs.

We affirm the hearing officer's determination that the claimant is entitled to third quarter SIBs.

We reform Finding of Fact No. 3 to state that during the qualifying periods for the second and third quarters of SIBs the claimant had some ability to work, to conform to the evidence and the hearing officer's discussion.

We reform the hearing officer's decision by striking sixth quarter SIBs from Conclusion of Law No. 6, the Decision, and the Decision and Order paragraph on the first page of the decision.

We reverse the hearing officer's determination that the self-insured waived the right to contest entitlement to second quarter SIBs, and we render a new decision that the self-insured did not waive the right to contest entitlement to second quarter SIBs.

We reverse the hearing officer's determination that the claimant is entitled to second quarter SIBs, and we render a new decision that the claimant is not entitled to second quarter SIBs.

We reverse the hearing officer's determination that the claimant is entitled to fifth quarter SIBs, and we render a new decision that the claimant is not entitled to fifth quarter SIBs.

The true corporate name of the insurance carrier is **CONROE INDEPENDENT SCHOOL DISTRICT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**DR. DON STOCKTON, SUPERINTENDENT
3205 WEST DAVIS STREET
CONROE, TEXAS 77304-2039.**

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge